able to rely on there being no usurpation by any person of the function of that court to decide it according to law. Conduct calculated to impair any one of the three requirements may be prosecuted for contempt.

On behalf of the appellant it was argued that the conduct of the Education Service Commission in the 'publication' of the show cause notice is tantamount to 'usurpation by the Commission of the function of the court to decide the pending legal proceedings according to law'. Here lies the central issue raised in the present appeal. If it appears that the conduct, i.e. publication of the show cause notice, may influence or appear to influence the decision of that court or may affect the minds of witnesses, then it is objectionable. This category of contempt is based squarely on conduct which prejudges any issue pending before the court. Lord Diplock in the *Times Newspapers* case puts the matter in its proper perspective. He seemed to consider such prejudgments a contempt on the basis that it would "inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law" (see page 71). It seems clear according to this category of contempt prejudgment of a pending case should not be published — it is absolutely prohibited. By prejudgment is meant, of course, a publication which takes up a stand as to which party in a given case is right or wrong either *in toto* or on a particular issue of the case. In the *Times Newspapers* case the article which it proposed to publish set out, apparently in some detail, evidence and argument intended to show that Distillers were negligent in the manufacture of thalidomide, an issue which, of course, lay at the heart of the dispute. Their Lordships were agreed that the publication should be restrained on the basis that it amounted to a prejudgment of the case.

We feel that the real question for the court in this case to decide whether there is contempt, is whether the risk of prejudice to a fair and proper trial of the pending legal proceedings is serious or real or substantial. That is an application of the ordinary *de minimis non curat lex* principle — the law does not concern itself with trifles. Intent alone is insufficient to establish contempt (see *R.* v. *Ingrams & Ors., Ex parte Goldsmith*[10]).

We are satisfied that the notice to show cause was merely a first step taken in the conduct of the proposed disciplinary proceeding against the appellant by the Education Service Commission in the proper exercise of its constitutional duties. The Commission had voluntarily desisted in the disciplinary proceeding in deference to the pending proceedings; accordingly there has been no discussion whatsoever on the facts pertaining to the charges carried in the show cause notice nor on the merits of the case for or against the appellant. We feel that the appellant had acted prematurely when he applied to the High Court on September 29, 1980 under Order 32(3) of the Rules of the High Court, 1980 to commit the respondents for contempt.

We cannot therefore see that the fair and proper trial of the issues in the pending action would be in any way hampered or adversely affected by the 'show cause notice'. The trial is to be by a judge alone; it is proper to assume he will not be improperly influenced in any way. Prospective or potential witnesses would not be deterred or discouraged from contributing their testimony, for there is no reason to suppose that the substance of their evidence or their readiness to contribute will be affected or in any way impaired. Such witnesses are either credible and reliable or they are not. Our adversary system of justice in which evidence is elicited by examination and cross-examination provides the means of demonstrating the character and quality of the witnesses. We are accordingly left with no impression of lurking danger of the kind we have mentioned.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

NORTH BORNEO TRADING CO. (B) SDN. BHD. v. HENRY WONG TAN FOOK

[F.C. (Lee Hun Hoe C.J. (Borneo), Syed Othman & Abdul Hamid F.JJ.) October 13 & November 6, 1981]

[Kuching — Federal Court Civil Appeal No. 66 of 1981]

Bankruptcy — Service of bankruptcy notice — Order for substituted service of bankruptcy notice — Publication in newspaper and Government Gazette — Publication in prescribed form — Bankruptcy notice itself not published — Bankruptcy Rules, 1969, rr. 97, 110 & Form 15 — Bankruptcy Act, 1967, s. 131.

In this case a bankruptcy notice could not be served personally on the respondent and the appellants obtained an order for substituted service, which stated that the bankruptcy notice shall be published in a newspaper and in the Government Gazette. The notice published was in the form prescribed by the Bankruptcy Rules, but the actual bankruptcy notice was not published. The respondent contended that the service was irregular as the actual bankruptcy notice was not published. The learned Judge set aside the service as he held it was not in compliance with the order. The appellants appealed.

Held: (1) in this case the publication was made to conform with the form prescribed by the Bankruptcy Rules and as in the circumstances the publication brought the bankruptcy notice to the knowledge of the debtor, there was no irregularity;

(2) the bankruptcy notice was duly served on the debtor in this case.

Cases referred to:-

(1) *Porter* v. *Freudenberg* [1915] 1 K.B. 857, 889.

(2) *Kamaruddin bin Mohamed* v. *United Motor Works (M) Sdn. Bhd.* [1982] 1 M.L.J. 126.

FEDERAL COURT.

S. Sahathevan for the appellant.

T.O. Thomas for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This appeal is against the decision of George K.S. Seah J. who allowed the Bankruptcy Notice served by substituted service to be set aside on the ground that it was not in compliance with the order.

A judgment for the sum of $3,760 with interest

at 6% was entered against the respondent (we shall call 'the debtor') on August 17, 1972 in Civil Suit No. 264/71. The judgment debt remained unpaid. The appellant (we shall call 'the creditor') instituted bankruptcy proceedings in July 1978 (B-K 55/78). Personal service of the bankruptcy notice was served on July 20, 1978. The debtor however applied to have the notice set aside on the ground that there was an action brought by him against the creditor for damages for libel in Civil Suit No. 186/70. The learned judge adjourned the bankruptcy proceedings pending the decision in the libel suit. Judgment in the sum of $50,000 was entered against the creditor. It was reversed on appeal. Bankruptcy proceedings then resumed upon a fresh bankruptcy notice. It could not however be served personally as the whereabouts of the debtor was unknown. Upon *ex parte* application for substituted service, an order was made to the effect that (1) the bankruptcy notice be served on the debtor by the publication of the same in one issue of the *Sarawak Tribune* and one issue of the *Sarawak Government Gazette* and (2) such substituted service be deemed to be sufficient service of the bankruptcy notice.

The publication of the notice of substituted service was duly made in the *Sarawak Tribune* on November 17, 1980 and the *Sarawak Government Gazette* on December 4, 1980.

On February 16, 1981, the debtor applied to have the substituted service set aside on the ground that it was bad in law for non-compliance with the order made by the Ag. Registrar on November 4, 1980. It is the debtor's contention that the service was irregular as the actual bankruptcy notice was not published in both the *Sarawak Tribune* and the *Sarawak Government Gazette*. It is the debtor's contention that the order by the Ag. Registrar required the bankruptcy notice to be so published.

The learned judge expressed the view that it was the term of the order that the bankruptcy notice be published. In his judgment "the publication must satisfy strictly the terms of the order for substituted service and if the Ag. Registrar ordered that the bankruptcy notice be published in both the *Sarawak Tribune* and the *Sarawak Government Gazette*, it was no answer to say that the form of the publication is in accordance with Form 15 of the Bankruptcy Rules and that such form would satisfy the terms of the same order." He also stated "the provision of section 131 has no application in as much as it is not a question of form or irregularity here but a failure to comply with the terms of the order for substituted service."

We shall, first of all, examine the law. Service of notice is governed by Rule 97 of the Bankruptcy Rules 1969 (BR97) as follows: —

"Service of notice Form 6, 15.

97. A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition."

The marginal note refers to Forms 6 and 15. Form 15 relates to substituted service of petition or bankruptcy notice and is relevant for purposes of this case.

Rule for substituted service is set out under BR110 which reads:

"Substituted service

110. (1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

Form 15

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor."

The marginal note to sub-rule (2) again refers to Form 15. It is convenient at this point to reproduce hereunder Form 15 —

No. 15
(Rules 97 and 110)
(Title)

SUBSTITUTED SERVICE OF PETITION OR BANKRUPTCY NOTICE

NOTICE IN GAZETTE

In the matter of a bankruptcy petition filed the..... day of.....19..... (or in the matter of a bankruptcy notice issued on the.....day of .....19.....).

To ..... of .....

Take notice that a bankruptcy petition has been presented (or a bankruptcy notice has been issued) against you in this court by ..... of ..... and the court has ordered that the said petition (or bankruptcy notice) be served on you by posting copies thereof together with a sealed copy of the Order for substituted service on the notice board of this court at ..... and on the front door of premises ..... being your last known address and/or the publication of this notice in the Gazette and/or in the ..... newspapers (following the terms of the Order for substituted service) shall be deemed to be service of the petition (or bankruptcy notice) upon you: (Add this in case of petition) and further take notice that the said petition will be heard at this court on the..... day of ..... at ..... o'clock in the ..... noon, on which day you are required to appear, and if you do not appear the court may make a Receiving Order against you in your absence.

Dated this ..... day of .....19.....

.....
Registrar

BR97 directs that the bankruptcy notice be served in the manner the rules prescribe for the service of a creditor's petition and likewise proof of service of such petition. Insofar as this case is concerned BR110 which deals with substituted service is applicable. The rule empowers the court to order substituted service to be effected in such a manner as the court thinks fit. The manner or method of effecting substituted service is contained in the order which reads —

"IT IS ORDERED that the Bankruptcy Notice taken out by the Creditor on the 15th day of October 1980 be served on the Debtor by the same being published in one issue of the Sarawak Tribune and one issue of the Sarawak Government Gazette and that such substituted service be deemed to be sufficient service of the Bankruptcy Notice and shall be deemed to have been effected on the day of publication of the said Bankruptcy Notice in the Sarawak Government Gazette."

The first part of the order directed that service of the bankruptcy notice be effected on the debtor by the same being published in one issue of the *Sarawak Tribune* and one issue of the *Sarawak Government Gazette;* the second part specified that the substituted service be deemed to be sufficient service of the bankruptcy notice and be deemed to have been effected on

the day of publication of the said bankruptcy notice in the *Sarawak Government Gazette*.

In our view the second part of the order relates clearly to the first part of the order. The date of publication in the *Sarawak Government Gazette* was made the effective date for reason that such publication would inevitably be carried out at a date much later than the date of the publication in the *Sarawak Tribune* by which time the whole of the order contained in the first part would have been carried out and only then that the bankruptcy notice shall be deemed to have been duly served on the debtor — (BR110(2)).

The central issue here is what constitutes sufficient service of the bankruptcy notice when effected by way of substituted service. In this regard two elements must be considered — (a) the term of the order and (b) the form to be used.

Looking at the order it may appear that it is the term of the order that the bankruptcy notice itself be published but what we also have to consider is whether the term of the order could be satisfied by causing the publications to be made in a manner in conformity with the form provided.

The rule provides a certain form to be used when effecting service of the bankruptcy notice by way of substituted service and that form is Form 15.

The question is whether by using the form provided sufficient service of the bankruptcy notice could be effected. In this respect we bear in mind that the method of substituted service should, in all reasonable probability, if not certainty, be effected to bring knowledge of the bankruptcy notice or the notice of the bankruptcy notice to the debtor. (see *Porter* v. *Freudenberg*[1]); (see also *Kamaruddin bin Mohamed* v. *United Motor Works (M) Sdn. Bhd.*[2]).

In the instant case, the publication was made to conform with Form 15 as provided in the Appendix. The question that calls for consideration is whether such publication was sufficient and regular. To answer the question it is necessary to determine whether the publication produced the desired effect, namely, that it brought to the knowledge of the debtor the bankruptcy notice.

It may be appropriate to note that BR4 which provides for the use of Form 15 states —

"4. The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used...."

The form applicable to BR97 and BR110(2) is Form 15 and it is not in dispute that the publication both in the *Sarawak Tribune* and the *Sarawak Government Gazette* was in conformity with Form 15. The main complaint is that the bankruptcy notice itself was not published. We see no merit in the argument for reason that the method employed to effect the substituted service was not, in our view, inconsistent with the term prescribed by the order. It was clearly set out in the publication that the bankruptcy notice had been issued in the High Court at Kuching, and that the bankruptcy notice could be inspected by the debtor at the court. This was sufficient, in our view, to bring knowledge of the bankruptcy notice or notice of the bankruptcy notice to the debtor. In consideration we see no irregularity whatever indeed we find that the publication did produce the desired effect. In our judgment the bankruptcy notice was duly served on the debtor. Finally we find that there is no necessity to invoke section 131 of the Bankruptcy Act. We therefore allow this appeal with costs both here and in the court below. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

HON CHEE ENTERPRISE v. BRITISH MARKITEX LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Syed Othman & Abdul Hamid F.JJ.) October 14 & November 6, 1981]

[Kuching — Federal Court Civil Appeal No. 135 of 1981]

Bills of Exchange — Bills dishonoured and protested for non-payment — Bills returned to original drawers — Action against acceptors of bills — Whether drawers entitled to obtain judgment against acceptors — Bills of Exchange Act 1949 (Act 204), ss. 29(3), 38, 54(a) & 61.

The respondents were the drawers and payees of and the appellants the acceptors of four bills of exchange which were subsequently negotiated. When the bills were presented for payment they were dishonoured and were duly protested for non-payment. As a result the bills were returned to the respondents, the original drawers and payees, who became the holders of the bills. They sued the appellants as acceptors of the bills. In their defence the appellants alleged that the respondents were not entitled to the claims under the bills. The respondents obtained summary judgment against the appellants and this was confirmed in the High Court. The appellants appealed.

Held, dismissing the appeal: (1) the drawer of a bill of exchange who after negotiating it and who later becomes a holder of the bill following the dishonour of the bill by non-payment is entitled to sue the acceptor of the bill;

(2) by accepting the bills in this case the appellants promised or engaged that they will pay the bills according the tenor of their acceptance and as they have failed to honour their promise, they were liable to the respondents who had become holders of the bills.

Cases referred to:-

(1) *Jade International* v. *Robert Nicholas Ltd.* [1978] 3 All E.R. 104; [1978] 3 W.L.R. 39.

(2) *R.E. Jones Ltd.* v. *Waring & Gillow* [1926] A.C. 670, 680.

(3) *Sutters* v. *Briggs* [1922] 1 A.C. 1.

FEDERAL COURT.

Chong Siew Chiang for the appellants.

Chew Pok Oi for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): The only question in this appeal is the right of respondents to sue appellants in their own name in respect of four bills of exchange.

Briefly, the respondents were the drawers and payees of and the appellants the acceptors of the said four bills which were subsequently negotiated. When the bills were presented for payment they were dis-